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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1055

W. T. STONE, Warden,

Petitioner,

—v.—

LLOYD CHARLES POWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1222

CHARLES L. WOLFE, JR., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

—v.—

DAVID L. RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1055

W. T. STONE, WARDEN,
Petitioner
v.
LLOYD CHARLES POWELL,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

No. 74-1222

CHARLES L. WOLFF, JR. WARDEN
NEBRASKA PENAL AND CORRECTIONAL COMPLEX,
Petitioner
v.
DAVID L. RICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AMICUS CURIAE

Interest of the Amicus Curiae 1/

The American Civil Liberties Union is a nationwide organization with 380,000 members dedicated to the protection of the rights enumerated in the Bill of Rights. It is particularly concerned with the fair operation of the criminal justice system and during its 55-year existence has stressed the need for full protection of the fourth amendment guarantees against unreasonable searches and seizures. It is also concerned with protecting avenues of redress for those alleging violation of their constitutional rights through the writ of habeas corpus. Since these two related cases present serious attacks upon both fourth amendment rights and habeas corpus protection, the ACLU submits this amicus brief.

1/ Letters from all the parties in the two cases consenting to the filing of this brief have been filed with the Clerk of the Court.

Statement of the Cases

Stone v. Powell

The respondent, Lloyd Charles Powell, was convicted of second degree murder arising out of an attempted robbery of a liquor store in San Bernardino, California. The victim, Mary Parsons, was the wife of the manager. In addition to testimony by Mr. Parsons and one of the respondent's companions, the prosecution introduced into evidence the murder weapon. The weapon had been found on the respondent 10 hours after the murder when he was arrested in Henderson, Nevada, for violation of a local vagrancy ordinance. At the trial respondent claimed that the weapon had been seized in violation of his fourth amendment rights since his arrest was invalid because the Henderson vagrancy ordinance was unconstitutional. The California courts upheld the validity of the search and the admission of the gun into evidence. Subsequently, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. The petition was denied, but the Court of Appeals for the Ninth Circuit held that the weapon should have been excluded at the murder trial since respondent had been arrested under an unconstitutional vagrancy ordinance.

Rice v. Wolff

Respondent was found guilty in the Nebraska state courts of first degree murder following the bombing death of an Omaha police officer. The police had obtained a search warrant for respondent's house and discovered several items of evidence which were introduced at his trial including blasting caps, dynamite wrappers, some pliers and some dynamite. The search warrant was based on an affidavit of a police officer which recited that the affiant had been informed that dynamite and other devices might be stored at respondent's home. Respondent claimed that the affidavit was insufficient to justify issuance of the warrant, but his motion to suppress the evidence was rejected by the Nebraska courts. However, the United States District Court for the District of Nebraska issued a writ of habeas corpus ordering respondent released from custody on the ground that the search warrant was not based on probable cause since there was no showing that the informant who told police that dynamite could be found in the home was reliable and there was no independent corroboration of that information. On appeal to the Eighth Circuit, the decision ordering release was affirmed.

Questions Presented

In granting the writ of certiorari, this Court requested counsel to brief and argue the following additional question in Stone v. Powell:

> Whether, in light of the fact that the District Court found that the Henderson, Nevada police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional respondent's claim that the gun discovered as a result of the search incident to that arrest violated his rights under the fourth and fourteenth amendments to the United States Constitution is one cognizable under 28 U.S.C. §2254.

In Wolff v. Rice, this Court requested the following additional question to be argued and briefed:

> Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable

under U.S.C. §2254.

This amicus brief is directed solely to this point and will not address itself to the other issues in the respective petitions for certiorari.

SUMMARY OF ARGUMENT

The petitioners ask this Court to take three revolutionary steps in the administration of criminal justice: (1) to overrule Kaufman v. United States 394 U.S. 217 (1969) and eliminate fourth amendment claims from federal habeas corpus; (2) to overrule Mapp v. Ohio, 367 U.S. 643 (1961) and eliminate the exclusionary rule in state criminal prosecutions; and (3) to overrule Brown v. Allen 344 U.S. 443 (1953). None of these steps should be taken, let alone all three.

Federal habeas corpus jurisdiction over fourth amendment claims by state prisoners is necessary for the following reasons:

(1) it comports with the historical purpose of the habeas corpus writ--namely, to allow federal courts to pass upon the violation of federal constitutional rights;

(2) state courts have not properly followed ruling precedents of this Court in fourth amendment cases. As a result many fourth amendment violations go unnoticed and uncorrected and state law enforcement officers are not properly guided in their actions, to the detriment of all citizens;

(3) the availability of the habeas corpus writ often encourages state officials to voluntarily acknowledge constitutional violations, or at the least to instruct state prisoners on how to use available state procedures.

(4) federal habeas corpus jurisdiction is necessary to provide for uniform application of fourth amendment claims.

Furthermore, there would be no savings in federal judicial administration if fourth amendment claims were eliminated. Very little time is spent on all post-conviction claims by federal judges. State prisoners often combine many overlapping claims in their habeas corpus petitions. Federal courts would still have to determine whether state courts provided for a fair hearing on fourth amendment claims.

Finally, there is no reason for eliminating the exclusionary rule at this time. It still constitutes the only effective check on lawless police action in the fourth amendment area, and the courts have an independent constitutional obligation to exclude illegally seized evidence.

ARGUMENT

Preliminary Statement

The petitioners in these cases urge this Court to take not one but three revolutionary steps in the administration of criminal justice. First they explicitly urge the Court to overrule Kaufman v. United States, 394 U.S. 217 (1969), which holds that fourth amendment claims are cognizable in federal habeas corpus. Secondly, they--or the Amici Attorneys General supporting their position--urge this Court to overrule Mapp v. Ohio, 367 U.S. 643 (1961), and to eliminate the exclusionary rule in state criminal prosecutions. Of course, the two arguments are inexorably linked together: if federal courts cannot review fourth amendment claims on federal habeas corpus, there is no effective restraint against fourth amendment violations by state law enforcement officers and the exclusionary rule would necessarily atrophy. Thirdly, the petitioners would revolutionize federal habeas corpus jurisdiction, overrule Brown v. Allen, 344 U.S. 443 (1953) and make state court findings binding on the federal courts. The modest question which this Court had requested the parties to argue would bring about the most fundamental change in the criminal justice system. There is no logical, practical, or constitutional reason why any one of

these three steps be taken, let alone all three of them.

I

THERE IS NO COMPELLING REASON FOR RESTRICTING THE PRESENT SCOPE OF THE HABEAS CORPUS WRIT BY ELIMINATING FOURTH AMENDMENT CLAIMS

This Court's request that counsel brief and argue the question of whether fourth amendment claims should no longer be heard on federal habeas corpus evidently grew out of the concurring opinion of Mr. Justice Powell in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973), which suggested the following reasons why federal habeas corpus should not be available to a state prisoner alleging a violation of his fourth amendment rights: (1) the historic purpose of the writ has been expanded far beyond its original purpose; (2) the writ should be restricted to constitutional claims relating to guilt or innocence and fourth amendment claims are "rarely relevant to this reason;" (3) the unprecedented extension of federal habeas corpus has put a great strain on the resources of the federal courts and created friction between the state and federal systems of justice; (5) the value of the exclusionary rule loses its force when claims of fourth amendment violations are made on federal habeas corpus years after the events in question and the deterrent effect on the police becomes negligible.

Each of these arguments must be examined in turn.

A. The historic evidence does not support the notion that federal habeas corpus could be limited to reviewing the violation of only certain constitutional rights.

This Court in Fay v. Noia, 372 U.S. 391 (1963), reviewed the historic background leading to the passage of the Judiciary Act of February 5, 1867 which first extended federal habeas corpus to state prisoners generally. The Court concluded that the habeas corpus power was extended "to what was conceived to be its constitutional limit." 372 U.S. at 417. However, Mr. Justice Powell in Schneckloth cites two law review articles which question this conclusion and claim that the 1867 law was designed to incorporate only the common law uses and functions of the writ. 2/

However, the history at best is inconclusive. A more recent analysis of

2/ Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441 (1963); Oaks, "Legal History in High Court -- Habeas Corpus," 64 Mich. L. Rev., 451 (1966)

the historic background 3/ cites statements by sponsors of the habeas corpus act that indicated it was to have the broadest scope. Thus Representative William Lawrence of Ohio said of the purposes of the bill:

> On the 19th of December last, my colleague introduced a resolution instructing the Judiciary Committee to inquire and report to the House as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wife and children of soldiers of the United States, and also to enforce the liberty of all persons. Judge Ballard, of the district court of Kentucky, decided that there was no act of Congress giving courts of the United States jurisdiction to enforce the rights and liberties of such persons. In pursuance of that resolution of my colleague this bill has been introduced, the effect of which

3/ See Tushnet, "Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte," 1975 Wisc. L. Rev. 484, 489.

> is to enlarge the privilege of the writ of hobeas [sic] corpus, and to make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred on them. It is a bill of the largest liberty, and does not interfere with persons in military custody or restrain the writ of habeas corpus at all. Cong. Globe, 39th Cong. 1st Sess. 4151 (1866)

Another sponsor, Senator Lyman Trumbull of Illinois, chairman of the Senate Judiciary Committee, said:

> Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States. Cong. Globe, 39th Cong. 1st Sess. 4229 (1866)

Professor Tushnet concludes:

> The evidence so far hardly supports the contention, belied by the words of the statute and of its sponsors, that the 1867 Act was a minor bit of legislation. The most effective argument in favor of that contention is the failure of anyone to discuss seriously the fact, if it was one, that the bill proposed a major transformation in federal-state relations. Here, however, Representative Lawrence's statement that the bill made the powers of federal courts "coextensive with all the powers that can be conferred on them" begins to make sense. The Civil War was a constitutional decision of the highest magnitude. Every Republican, moderate or radical, knew that a fundamental shift in power from state to federal government had occurred when the Union forces prevailed; disagreements between moderates and radicals concerned the manner in which that shift would be implemented. . . . Everyone involved knew that federal power extended to new areas. Future Congresses would give precise definition to new federal rights, similar to that given by the Civil Rights Act of 1866. It made sense, there-

> fore, to provide an extensive federal remedy for violation of federal rights in general, even though no one could know what the particular rights protected would be. 1975 Wisc. L. Rev. at 490-491.

This analysis precisely fits the words of the habeas corpus statute, 28 U.S.C. §2254, which permit the writ to be issued on behalf of a person in custody "pursuant to the judgment of a state court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." There is nothing in the words or history of the statute that indicates that the statute would apply with respect to some constitutional rights but not to others. The scope of the constitutional rights involved might change, the basis for review might change, but there is no occasion for distinguishing one right over another once jurisdiction to issue the writ was found.

B. The purpose of the writ is to determine whether a constitutional right has been violated, not whether a prisoner is innocent or guilty.

The heart of Mr. Justice Powell's

opinion in Schneckloth is his suggestion that the habeas corpus writ be available to state prisoners only if they can show that they were in fact innocent of the crime, though he concedes that the traditional test has not been guilt or innocence but only whether a constitutional right has been violated.

That traditional point of view has been expressed time and again in numerous decisions of this Court. In a leading federal habeas corpus case Mr. Justice Frankfurter, speaking for the Court, wrote: "A defendant has the right to be tried according to the substantive and procedural due process requirements of the fourteenth amendment." Rogers v. Richmond, 365 U.S. 534, 544-45 (1961). Elsewhere this Court wrote: "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Harris v. Nelson, 394 U.S. 286, 290-91 (1969). The root principle of habeas corpus is that "government must always be accountable to the judiciary for a man's imprisonment." Fay v. Noia, 372 U.S. 391, 402 (1963). And Mr. Justice Frankfurter pointed out in McNabb v. United States, 318 U.S. 332, 340 (1943): "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."

It is regrettable but unfortunately true that the state courts cannot be relied upon to enforce fully the constitutional rights of defendants and to maintain the civilized standards of procedure which Justice Frankfurter referred to. In numerous cases fourth amendment claims were presented to state courts and rejected, although the applicable precedents made clear that the fourth amendment had been violated. However on federal habeas corpus, the constitutional claims were upheld. A sample of such cases follows.

United States ex rel Coleman v. Smith, 395 F. Supp. 1155 (W.D.N.Y. 1975). Defendant was found guilty of possession of heroin. He moved to suppress the introduction into evidence of the drugs which had been seized by defendant's parole officer after a search of his apartment without a warrant. The New York courts denied his motion to suppress the evidence on the ground that defendant had consented to the search when signing an "agreement" allowing indiscriminate searches by the authorities as a condition to obtaining parole. The federal district court granted the petition for habeas corpus on the ground that the consent was not voluntary.

Haefeli v. Chernoff, 394 F. Supp. 1079 (D. Mass. 1975). Defendant had been indicted and convicted of receiving

stolen property. He moved to suppress the introduction into evidence of certain checks which had been seized from his parked car. The Massachusetts courts denied his motion, but the federal district court granted his petition for habeas corpus on the ground that there was nothing plainly or immediately incriminating about the checks when the police observed them from outside the car so that the "plain view" doctrine did not apply. He was arrested far away from his parked car so the search was not incident to the arrest and the automobile exception did not apply since the car was not mobile.

O'Berry v. Wainwright, 294 F. Supp. 591 (S.D. Fla. 1975). Defendant was found guilty of rape. After his arrest, the police without a warrant seized his car which was parked in his driveway. A detective later testified that there were wipe marks on the rear seat. The defendant moved to suppress any evidence or testimony relating to the car on the ground that it had been illegally seized. Despite the fact that the case was virtually identical to this Court's decision in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Florida courts refused to suppress the evidence or testimony. O'Berry v. Wainwright, 300 So. 2d 740 (1974) The federal district court granted a petition for habeas corpus on the ground that the case was identical

to and governed by the Coolidge case.

Moffett v. Wainwright, 512 F. 2d 496 (5th Cir. 1975). Defendant was found guilty of armed robbery. He had been arrested for vagrancy and two police officers went to his apartment accompanied by a female friend of the defendant where they found two young girls. The police asked for permission to search the apartment and later testified that the women consented to the search. Certain incriminating evidence was found and later introduced into evidence. The trial court considered the search and determined it was constitutional, but on a habeas corpus petition, the Fifth Circuit held that the state failed to prove that the search had been consented to by third parties with sufficient rights to the premises.

Patterson v. Lockhart, 513 F. 2d 579 (8th Cir. 1975). Defendant was convicted in the Arkansas state courts of possession of stolen property. The state courts rejected a motion to suppress certain evidence based on defendant's claim that the affidavits presented in support of the search warrants were insufficient. A habeas corpus petition was filed in federal district court and denied, but on appeal to the Eighth Circuit, the state confessed error, admitting that the affidavits were insufficient. The Court of Appeals commented: "It is difficult

to understand why the state has failed to confess error until this late date. The search warrant was defended in the state courts as well as in the federal district court. The state even defended the legality of the search in briefs filed in this court. Three affidavits were presented in support of the warrant. They were all conclusory and clearly insufficient." 513 F. 2d at 580, n.2.

Fankboner v. Robinson, 391 F. Supp. 542 (W.D. Va. 1975). Defendant was found guilty in the Virginia state courts of possessing a sawed-off shotgun. Two police officers had gone to defendant's apartment, knocked on his door, identified themselves and asked whether they could talk to him for a few minutes. When defendant said "sure," they entered his apartment, saw the sawed-off shotgun on a refrigerator and arrested defendant. The state courts denied a motion to suppress, stating that defendant had consented to the entry. The federal district court granted the habeas petition on the ground that the defendant never consented to the police entry.

Tabasko v. Barton, 472 F. 2d 871 (6th Cir. 1972). Defendant was found guilty in the Ohio state courts of possession of narcotics. Certain evidence introduced at the trial had been seized pursuant to a search warrant. The Ohio court rejected a motion to suppress the

evidence based on defendant's claim that the affidavit in support of the warrant was insufficient. A petition for certiorari to this Court was denied, Tabasko v. Ohio, 400 U.S. 998 (1971). On a petition for habeas corpus, the Sixth Circuit held that the affidavits were conclusory and insufficient and that additional oral testimony submitted to the magistrate to establish probable cause did not make up the deficiency in the affidavit since it was not taken under oath.

Cash v. Williams, 455 F. 2d 1227 (6th Cir. 1972). Defendant was found guilty in the Tennessee state courts of possession of marijuana. The marijuana had been found by the police after the defendant's car had been impounded by a deputy sheriff following an arrest of defendant's brother-in-law for driving without a license. The Tennessee courts upheld the validity of the search of the car made by a wrecker operator who had taken the car to his garage at the direction of the deputy. A petition for certiorari to this Court was denied. 400 U.S. 995 (1971) On federal habeas corpus, the Sixth Circuit held that the wrecker operator was an agent of the police and that the search of the car was illegal since it was not incident to an arrest, there was no reason to inventory the contents of the car, and the opportunity to search the car was not "fleeting."

Blazak v. Eyman, 399 F. Supp 40 (D. Ariz. 1971). Defendant was convicted of possession of marijuana in the Arizona courts. The police, who had received a tip that the defendant was in possession of narcotics and also learned that his driver's license had been suspended, observed him in a gas station but waited until he was driving his car before they arrested him for driving with a suspended license. They found some marijuana on his person. The state courts rejected defendant's claim that the evidence should have been suppressed because the arrest was a pretext. However, the federal district court granted the petition for habeas corpus on the ground that the arrest was made solely for the purpose of discovering evidence to support another charge.

Root v. Gauper, 438 F. 2d 361 (8th Cir. 1971). Defendant was found guilty of manslaughter in the killing of her husband. The police had entered the defendant's home without a warrant and seized a shotgun and some shells which were introduced into evidence at her trial. The entry had been made after the victim had been removed to the hospital and when no one else was in the home. The Missouri courts held that the entry was justified as an emergency, but the Eighth Circuit granted the habeas corpus petition on the ground that the police knew the victim had

already been removed from the home and there was no reason to believe there were any other persons in need of aid, and thus the entry and seizure violated the fourth amendment.

Heffley v. Hocker, 420 F. 2d 881 (9th Cir. 1969). Defendant was found guilty of burglary in the Nevada state courts. Certain documents which had been stolen were found under some guns and other paraphernalia in the rear of defendant's car which had been seized after his arrest for illegal possession of the guns. The car was searched at the police station without a warrant after the arrest. The Nevada state courts upheld the search, claiming it was an inventory search. The Ninth Circuit granted the writ of habeas corpus on the ground that the search was exploratory and was not made to protect or inventory defendant's possessions since the police officer testified he looked "under the hood, wheels everything."

United States ex rel Boyance v. Meyers, 398 F. 2d 896 (3d Cir. 1968). Defendant had been found guilty of burglary. Certain evidence introduced at his trial was seized pursuant to a search warrant which specified that the search be made in the daytime; nevertheless, the search and seizure took place in defendant's family home at 2:30 A.M. The state courts upheld the seizure of the incrim-

inating evidence, but the Third Circuit granted the petition for habeas corpus on the ground that the explicit limitation of the warrant to a daytime search could not be disregarded by the police.

State of Texas v. Gonzales, 388 F. 2d 145 (5th Cir. 1968). Defendant was found guilty in the Texas state courts of possession of heroin. The police having received a tip that narcotics were being peddled at a certain home, an officer went to the house, walked around the yard to peer into the window, and stood on a drain pipe outside another window to see what was going on. He observed white powder on the table. The police then arrested all those in the house at the time including the defendant. The Texas courts upheld the validity of the arrest and the seizure of the heroin, but the Fifth Circuit granted the petition for habeas corpus on the ground that the police lacked probable cause to peer into the windows from close vantage points on the property.

United States ex rel Nickens v. LaVallee, 279 F. Supp. 248 (S.D.N.Y 1967). Defendant was found guilty of burglary in the New York state courts. Certain incriminating evidence had been seized by the police without a warrant at the defendant's apartment after he had been arrested and booked. The state courts refused to suppress the evidence, but the

federal district court granted the habeas corpus petition on the ground that the search was not incident to the arrest since it was made long after the defendant had been removed from his apartment.

United States ex rel DeForte v. Mancusi, 379 F. 2d 897 (2d Cir. 1967). Defendant had been found guilty of conspiracy and extortion in the New York state courts. Various union books and records had been seized without a warrant and introduced into evidence against him. The state admitted that the seizure was illegal but claimed that defendant lacked standing to complain. The state courts refused to suppress the evidence, and certiorari to this court was denied. People v. DeGrandis, 375 U.S. 868 (1963) The Second Circuit granted the petition for habeas corpus on the ground that the defendant had standing to complain of the illegal search since it was directed against him in his normal place of business in which he spent a considerable part of each day.

United States ex rel DeNigris v. Menser, 360 F. 2d 199 (2d Cir. 1966). Defendant was found guilty of pool selling (gambling) in the Connecticut state courts. Certain evidence had been seized pursuant to a search warrant which the defendant claimed was invalid since the affidavit upon which it was based was insufficient under Aguilar v. State of

Texas, 378 U.S. 108 (1963). The state courts rejected the claim, but the Second Circuit granted the writ of habeas corpus on the ground that the affidavit was insufficient and the magistrate did not personally determine the existence of probable cause for the search.

United States ex rel Manduchi v. Tracy, 233 F. Supp. 423 (E.D. Pa. 1964). Defendant was found guilty of bookmaking in the Pennsylvania state courts. Certain evidence had been seized pursuant to a search warrant. The police officers arrived at the defendant's apartment, knocked, heard a "scuffling noise" inside, and then proceeded to knock down the front door with a sledge hammer. At the same time two other detectives broke open another door to the apartment with a section of a wooden telephone pole. The state courts upheld the validity of the search, but the federal district court granted a writ of habeas corpus on the ground that the search was invalid since the officers did not announce their authority and purpose prior to the entry and had no justification for dispensing with the announcement.

These cases lead to three inescapable conclusions:

(1) Many fourth amendment violations

would go completely unnoticed and uncorrected if the federal writ of habeas corpus were not available to review fourth amendment claims of state prisoners. It is obvious that this Court cannot hope to review all the fourth amendment claims that come to it directly from the state courts on certiorari. Thus without federal habeas corpus many of the egregious fourth amendment claims described above--the crashing into a person's home with a sledge hammer and a telephone pole without announcement, the searching of a person's apartment without a warrant after he was arrested and booked, the pretext and sham arrest to justify a warrantless search--would have been ignored. It is not only the particular defendants involved who would suffer from this lack of oversight. Without the guidance of the federal courts as to what constitutes an illegal search under the fourth amendment, the state authorities themselves do not know the limits of their authority. And ultimately the privacy of all our citizens falls into jeopardy.

(2) Many state courts appear to be either ignorant of or unsympathetic to fourth amendment claims. Possible reasons for this lack of sympathy are described below. But the fact that it exists seems unquestioned. Otherwise there was no reason for the Florida courts in the O'Berry case to ignore totally a

decision of this Court in the Coolidge case which was directly in point. As the district court noted in that case: ..."it is a rare case in which the Supreme Court has previously ruled on a virtually identical set of facts. In all material respects, however, this case is the same as Coolidge." O'Berry v. Wainwright, 394 F. Supp. at 593. In a similar situation some years ago, this Court overturned the "special circumstances" rule in right to counsel cases and established a blanket rule requiring appointment of counsel in all cases. One reason for the change was that it appeared that the state courts were not following guiding precedents of the federal courts in sixth amendment cases. As Justice Harlan explained the situation:

> This evolution [expanding the special circumstances rule to more and more situations] appears not to have been fully recognized by many state courts, in this instance charged with the front line responsibility for the enforcement of constitutional rights. Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring)

Where the state courts have failed their "front line responsibility," removal of the only effective check on their actions would have the most serious constitutional consequences.

(3) The cases described above indicate that there are other salutory effects from federal habeas corpus jurisdiction in fourth amendment claims. In some situations, the mere availability of the writ may lead the state authorities to acknowledge fourth amendment violations voluntarily. In the Patterson case, supra, the state confessed error for the first time when on appeal to the Fifth Circuit. In a comprehensive study of federal habeas corpus petitions in Massachusetts (Shapiro, "Federal Habeas Corpus: A Study in Massachusetts," 87 Har. L. Rev. 321 (1973)), Prof. David L. Shapiro pointed out:

> There were a number of cases in which a petitioner made a significant gain even though the matter prayed for was not granted. Perhaps the clearest case was one in which petitioner, one Miller, alleged that he had been sentenced by a state district court without trial, plea or counsel, and had been unable to obtain any redress in the state courts. Following appointment of counsel to represent him, the petitioner was voluntarily released by state authorities without condition of probation, parole, or retrial. In a letter

> to the federal court, Miller's appointed attorney said that although the dismissal "avoids some very serious constitutional issues involved in [state] District Court procedure," the disposition is "in the best interests of my client." Miller himself wrote to Judge Wyzanski that until the federal action had had its impact, "I had lost my faith in the American system of justice." 87 Harv. L. Rev. at 340-41

Professor Shapiro describes other benefits of federal habeas:

> Other, more frequent, instances were less dramatic but significant in their own right. Thus there were many cases in which for any number of reasons--ranging from the prisoner's ignorance, to his counsel's inattention, to the default of state court officials--state court postconviction proceses had ground to a halt and the federal petition was instrumental in getting them started again. In one case, for example, the petitioner filed a pro se state habeas corpus petition in December 1970; it was not acknowledged by the clerk until October 1971,

and nothing further happened until a federal petition was filed in March 1972. At that point, a state court hearing on the question of appointment of counsel was scheduled and the federal action dismissed for failure to exhasust. In another case, the petitioner had been unable to obtain state appellate review because, despite a state law directing the clerk to prepare a summary of the record "forthwith," 44 months had passed without completion of the summary. A federal hearing was held, assurances were given that the case would go forward promptly, and the district court retained jurisdiction pending completion of the appeal within a reasonable time. Ibid. at 341

He concludes:

> In still other cases, the question was not one of mere delay in the state courts; rather the petitioner was unrepresented and not sufficiently familiar with the exhaustion requirement, or with the procedures to be followed in the state courts, to obtain relief. As a result of the filing of a federal

> petition, the court itself, the respondent, or appointed counsel would indicate to the petitioner the route to be followed in the state courts, and in some instances appointed counsel might even continue the representation in those courts.

In sum, there are a substantial number of cases--difficult to count because they are not often disclosed by the face of the record--where habeas corpus proves a useful remedy even though the matter prayed for is not granted. For the most part, these are cases in which state processes have for one reason or another been derailed and federal assistance has been helpful in getting them back on the track--cases in which even the most vigorous critics agree that habeas corpus has an important function to perform. Ibid. at 341-42.

There are a number of reasons why federal habeas corpus jurisdiction is so important for maintaining civilized standards of procedure.

(1) It seems unquestioned that the state courts do in fact look unsympathet-

ically on fourth amendment claims. As a leading law review note on the problem has indicated:

> state judges may be inclined unduly to reflect in their decisions the substantive goals of the state criminal law, primarily focusing on ensuring that the guilty are punished and on protecting society by their detention. To a state trial judge, the goals of the Federal Constitution in protecting individual rights from unlawful government action may appear less important than a conviction in any given case. The federal habeas court, however, is lodged in a different institutional setting, with different loyalties and assumptions which may foster greater hospitality to constitutional goals. In some sense, the federal judge's primary allegiance to the Constitution may be weakened by his proximity to the state's enforcement of its criminal law. The federal forum, therefore, may be preferable for the separate proceeding which tests the constitutional basis of the conviction, not the prisoner's guilt or innocence. Note, Developments--

> Federal Habeas Corpus," 83 Harv. L. Rev. 1038, 1060-61 (1970)

(2) In addition, federal habeas corpus jurisdiction in fourth amendment cases provides for more uniform application of fourth amendment claims. As the Harvard Law Review note states:

> providing a federal forum creates a greater likelihood of uniform application of federal constitutional law to all state prisoners. Not only is the possibility of local disregard of federally protected interests lessened, but also the appellate supervision of the federal district courts by the eleven federal courts of appeal provides a cohesive influence in the federal judicial system not present when fifty independent state judicial systems interpret constitutional law. The Supreme Court's review of state decisions cannot systematically induce this sort of uniformity, for the practical burden is too great. Ibid. at 1061

(3) Finally, there should be an opportunity for the federal courts to review federal constitutional claims for the very reason why federal courts were established in the first place. Prof.

Henry Hart explained the principle as follows in discussing the rationale of Brown v. Allen, 344 U.S. 443 (1953):

> [Brown] can be both explained and justified as resting on the principle that a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal constitutional court, and that, if the Supreme Court in its discretion denies this opportunity on petition for certiorari, it ought to be available on federal habeas corpus in a federal district court. Hart, "The Supreme Court, 1958 Term. Foreward: The Time Chart of the Justices," 73 Harv. L. Rev. 84, 107-08 (1959)

Prof. Shapiro notes:

> My conversations with lawyers and with prisoners leave me with the distinct impression that...there is value in having independent, relatively disinterested federal confirmation of the correctness of a state conviction, in that there is one guaranteed federal review of the federal questions that are now bound to arise in so

> many criminal cases. Shapiro, supra, 87 Harv. L. Rev. at 342

For all of these reasons, federal habeas corpus is necessary not only to insure that the innocent go free but that the state governments do not violate the civilized standards of procedure embodied in the Constitution.

This was precisely the rationale of this Court when it held that fourth amendment claims could be asserted under 28 U.S.C. §2255. In Kaufman v. United States 394 U.S. 217, 226, the Court said:

> The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all. The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief. This is no less true for federal prisoners than it is for state prisoners.

It is interesting to note that the Solicitor General in the Kaufman case acknowledged that federal habeas corpus should be available to state court prisoners asserting fourth amendment rights even when he argued that it should not be available to federal prisoners. This Court summarized the four arguments in support of that position as follows:

> the necessity that federal courts have the "last say" with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions. 394 U.S. at 225-26.

All of those reasons continue to apply. This Court's judgment in Kaufman was correct and nothing has happened in the intervening years to justify overruling its decision.

C. Eliminating fourth amendment claims from federal habeas corpus would not appreciably reduce the workload of the federal courts nor reduce the

strain between the state and federal systems of criminal justice.

Mr. Justice Powell suggested in Schneckloth that eliminating fourth amendment claims from federal habeas corpus would lead to more effective utilization of the limited judicial resources of the federal courts. He also claimed that it might also minimize the friction between the state and federal criminal justice systems and lead to finality in criminal trials. All of these conclusions are of dubious validity.

(1) The available statistics indicate that the total amount of time spent by the federal courts on habeas corpus petitions is, unfortunately, quite limited. The Annual Reports of the Director of the Administrative Office of the United States Courts indicate that a very small percentage of the habeas corpus petitions actually go to trial. In 1972 only 3% went to trial. In 1973 the figure was less than 3% and for the first six months of 1974 slightly over 3% 4/ A 1971 study by the Federal Judicial Center indicated that about 5% of the time of the 62 federal

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4/ See Table C-5b of the Annual Reports of the Director of the Administrative Office of the United States.

judges surveyed were spent on post-conviction cases. 5/ These included both §2254 and §2255 cases as well as suits challenging prison conditions. Professor

5/ See Wulf, "Limiting Prisoner Access to Habeas Corpus--Assault on the Great Writ," 40 Brooklyn L. Rev. 253, 270-71 (1973) Mr. Wulf adds:

> But bare statistics do not tell the entire sotry, for, once closely examined, they are less of a burden than would appear. Assuming, however, that post-conviction petitions continue to be a burden on the courts, one must nonetheless contrast that burden upon judges' time with the social interests which underlie the entire scheme of federal post-conviction review, and contrast it also with the relative importance of other demands made upon the federal judiciary by other classes of cases. Even if one concedes that the federal judges must now work under intolerable pressure, it might be more reasonable to consider restricting diversity of jurisdiction, for example, than to restrict the scope of habeas corpus. Ibid at 256.

Shapiro questioned some of the figures of the Administrative Office but concluded that however one defined the nature of the hearing, they tended to be short: ". . . at least 75 of the hearings [that were surveyed in Massachusetts] were completed in one-half day or less, an additional 10 in one day or less and only 9 . . . in excess of one day." Shapiro, supra, 87 Harv. L. Rev. at 337.

(2) It is almost impossible to predict how many fewer habeas corpus petitions would be filed if fourth amendment claims were eliminated. Prof. Shapiro's study indicated that the petitions almost always contain many overlapping claims--fourth amendment violations, ineffective assistance of counsel, pretrial identification problems, and so on. Eliminating only one claim in such a list would not reduce judicial time.

(3) Furthermore, Mr. Justice Powell's formulation would require the federal courts to spend additional time considering a new question which they have not had to worry about under the present system, namely "whether the prisoner was provided a fair opportunity to raise and have adjudicated the fourth amendment question in state courts." 412 U.S. at 250. It is at least arguable that the federal courts would have to spend more time debating that question than they now spend considering the merits of the

fourth amendment claim.

In such a situation, the friction between the state and federal courts could hardly be expected to decrease. If the federal courts may still consider fourth amendment claims when the state failed to consider defendant's contentions, the state courts would be likely to resent the situation even more than they do now" because of the clear implication of state court inadequacy." Tushnet, supra, 1975 Wisc. L. Rev. at 496.

Finally, as Mr. Wulf has written:

One must think of the power of habeas corpus as the functional equivalent of the criminal law. In recognition of the defective nature of human behavior, society undertakes to control that behavior by adopting criminal codes which threaten sanctions against those who violate norms of conduct. The hope, which is largely realized, is that the criminal law will deter criminal conduct. Likewise, judges and law-enforcement officials, who are susceptible at least to some of the behavior defects found in the public at large, are surely deterred from misbehaving in the constitutional

sense by the existence of a legal structure which can effectively subject their behavior to review and control. The appellate courts perform this role within each state's legal system. But the availability of effective review and control by the federal courts, more keenly attuned to the notions of justice embedded in the United States Constitution, is an indispensable part of the system of law enforcement. It is important to the maintenance of federal constitutional standards that that system not be dismantled. 40 Brooklyn L. Rev. at 272.

II

THE ENFORCEMENT OF FOURTH AMENDMENT RIGHTS REQUIRES CONTINUED APPLICATION OF THE EXCLUSIONARY RULE

The Attorneys General who have submitted amici briefs in these cases have seized the occasion to make a frontal attack on Mapp v. Ohio, 367 U.S. 643 (1961), and the continued utility of the exclusionary rule. Of course there is nothing in the two cases that requires

this Court to consider the question, but the instincts of the amici seem quite correct: if federal courts cannot consider fourth amendment claims on habeas corpus, then the one effective remedy for enforcing fourth amendment rights will be eliminated and the exclusionary rule is sure to atrophy and therefore should be attacked directly.

The petitioners' briefs cite numerous books, articles and judicial declarations about the rationale of the exclusionary rule. Much of the debate about the rule focuses on the search for a single principle to explain its purpose: police deterrence, judicial integrity or personal rights.

At this point, however, it is still unquestioned that the exclusionary rule is the only effective manner of enforcing fourth amendment rights at any level of the criminal justice system. Thus this Court has been correct in its consistent holding that the exclusionary rule is a necessary first condition in any judicial program for enforcing fourth amendment rights.

It is important to recognize that the exclusionary rule is directed not only at illegal police conduct, but at the violation of constitutional liberties by the entire criminal justice system. Thus the exclusionary rule is not truly

a sanction directed at the individual police officer, either by its terms or by its effect. The rule exists to enforce the fourth amendment throughout the criminal justice system, from the officer on the beat, to the prosecutor, to the trial judge. As Mr. Justice Day said in Weeks v. United States, 232 U.S. 383, 391-92 (1914):

> The effect of the fourth amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people. . . against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

A leading law review article on the exclusionary rule has pointed out that the courts and the police officers are not "moral strangers . . . but . . . parts of the same government and parties to the same governmental course of conduct

and, indeed, neither a criminal court nor a law enforcement officer makes sense in isolation of the other. A criminal court is not an intelligible institution without the expectation that it will receive evidence from which to synthesize verdicts and judgments. By the same token, a policeman--e.g., the marshal in Weeks--may be out in the field, but his being out there in a law enforcement, as opposed to some administrative, capacity is only intelligible on the expectation that he will come in to court." Thomas S. Schrock and Robert C. Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251, 300 (1974). The authors go on to say:

> The exclusionary thrust of the amendment is not just an impersonal proscription of the use of unreasonably seized evidence; the amendment recognizes an exclusionary right in the defendant, a right that is conceptually and morally part and parcel with the right to be free from unreasonable searches and seizures. To put it as intransigently, and correctly, as we know how, the basic right is to be free from the entire transaction; the right to exclusion and the right to be free from the original invasion are

> coordinate components of that embracing right. Id. at 300-301.

The authors conclude:

> And for any part of the government to commit a wrong denominated as such by the fourth amendment is not just to do wrong in the abstract, but to violate a person's consitutional right.
>
> * * *
>
> This duty of judicial review is, we shall argue, the correlative of the defendant's due process right to have the law of the land applied in his case: he has a right to have the court sitting in his case consult the Constitution when executive conduct related to his case is challenged under any of its parts. And when search and seizure conduct is successfully challenged as unreasonable, he has a due process right to exclusion of the disputed evidence, because exclusion is the only concrete expression which adverse judicial review of unreasonable search and seizure can take. Ibid at 302, 308-09.

But even if this Court accepts the

notion that deterrence is the crucial basis on which the exclusionary rule rests it must still come to the conclusion that fourth amendment rights must be asserted on federal habeas corpus. The simple answer to Mr. Justice Powell's speculation that state officers may not be deterred from illegal searches because of the availability of federal habeas corpus is that the state courts, by not enforcing the fourth amendment, are certainly not deterring them. The survey of cases above shows a lack of sympathy by the state courts to fourth amendment claims. It is only because federal habeas corpus has been available to tell the state courts how to interpret the fourth amendment that the situation is not worse than it is. Thus the only way police officers can be deterred from more constitutional violations is by continuous instruction to the state courts by the federal courts in habeas corpus petitions as to how the fourth amendment should be interpreted.

Finally, petitions have suggested that because this Court has not given retroactive effect to certain fourth amendment decisions, then, by analogy, it is proper also to limit habeas corpus jurisdiction in this area. However the considerations relating to retroactivity have nothing to do with habeas corpus. As Mr. Wulf has written:

Giving a decision retroactive effect bestows a windfall benefit upon a defendant, and prejudices the state which secured a conviction in compliance with all constitutional requirements which were applicable at the time of prosecution. Even then, however, the Supreme Court, in the spirit of fairness, has held that a new constitutional rule must be applied retroactively if it might have affected the determination of guilt or innocence. But that policy has no relevancy to the question of whether a defendant was denied an existing constitutional right at the time of his trial and conviction. In that circumstance, the only issue is whether the state will be permitted to escape the enforcement of a constitutional rule (and its underlying policy) which it was obliged to recognize, such as the exclusionary rules under the fourth and fifth amendment and the rule which guarantees a suspect the right to counsel at interrogation.

While there may be some reason not to compel the application of new rules to old prosecutions, there is surely no

excuse for allowing law enforcement officers to evade known rules by withdrawing the power of the federal courts to enforce them, thus leaving the states free to treat those rules as if they did not exist. 40 Brooklyn L. Rev. at 255-56

CONCLUSION

For the reasons noted above, the Court should hold that fourth amendment claims continue to be cognizable under 28 U.S.C. §2254.

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